made by the mortgagor, if those mortgages were upon the registry, ought not to affect the prior mortgagee, as it seems to us, beyond the knowledge of the contents of the deed. He may fairly be presumed to have gone to the registry and learned the contents of the deeds. The one which was given as security for an actual liability assumed before the execution of the deed will, of course, bind the first mortgagee not to make any further advances under his deed, except as relying upon a lien subsequent to that created by the later mortgage to secure an existing obligation.

But as to the mortgage given merely to secure future advances, it rather seems to us he is not bound to regard that as a present subsisting incumbrance until he is either notified of advances under it, or else knows of some fact which obliges him, as a prudent man, to make inquiries which would discover the fact. And it seems to us, that mere knowledge of such a deed will not oblige the prior incumbrancer to keep up an inquiry from time to time of his junior incumbrance in regard to the state of his accounts with their common mortgagor. It seems to us this is placing the two mortgages precisely upon an equality and ignoring all priority of right in the priority of lien. We think the burden of watching the state of the dealings may fairly be thrown upon the junior incumbrancer. In this respect we should incline to the view of Judge BUTLER, who dissented from the opinion of the Court. I. F. R.

## *Supreme Court of Iowa.*

### M'CORMICK *vs.* RUSCH.

1. A State Legislature may constitutionally pass an act which provides that if it shall be shown to the satisfaction of the Court that a defendant is in the actual military service of the United States, any action against him in the Courts of such State, shall stand continued during the period of his actual service.
2. Such an act does not conflict with the provision of a State Constitution requiring "all laws of a general nature to have an uniform operation."
3. Nor does it infringe section 10, article 1, of the Federal Constitution, which prohibits any State from passing laws to impair the obligation of contracts.
4. The prohibitory clause of the Federal Constitution discussed, and some of the leading cases reviewed and commented upon by WRIGHT, J.

This action was commenced in October, 1862. Defendant, by his attorney, made the proper showing that he was in the actual military service of the United States, and moved for a continuance. Plaintiff resisted the motion, upon the ground that the statute authorizing such continuances was unconstitutional, and also because no plea or answer had been filed. He also moved for judgment for

want of plea. This motion was overruled and the continuance granted. Plaintiff appeals.

*S. E. Brown*, for appellant.

*H. R. & E. Claussen*, for appellee.

WRIGHT, J.—We are satisfied that it was not necessary for the defendnat to answer before obtaining the continuance. The statute is: "That in all actions now pending or hereafter brought in any of the Courts of this State, * * * it shall be a sufficient cause for a continuance, on motion of the defendant, his agent or attorney, if it shall be shown to the satisfaction of the Court * * * that the defendant is in the actual military service of the United States, or of this State, and upon such showing being made, said action shall stand continued during the actual service of said defendant in the military service." Laws 1862, ch. 109, sec. 1. The theory of the statute is, that such defendants are necessarily absent, engaged in the service of the country, that while thus situated they should not be called upon to defend suits and actions brought against them at home, and to compel them to plead or answer before asking a continuance, would frequently defeat the very object and purpose of the statute. We need do no more than suggest that the advice and assistance of the party are frequently absolutely necessary to the proper preparation of the pleadings, and the law provides for such continuances as much on account of such known necessity, as to give him an opportunity of being present at the final trial. To say that until he pleads it is not known that he has a defence, and that unless he has some defence, there is no necessity for a continuance, substantially begs the whole question. It is because, among other things, he is not in a position to present this pleading, that the law secures him the continuance. To hold that he shall not have the benefit of a law because he fails to do that which the law itself presumes him incapable of doing, would make the statute inconsistent, and defeat the very object proposed by the legislature.

Is the statute unconstitutional, and if so, upon what grounds? To the suggestion that it conflicts with Sec. 6, Art 1, of our

State Constitution, which provides that "All laws of a general nature shall have a uniform operation," we give but little weight. The provision was not intended to cover or reach any such case. In the first place, it may be doubted whether it is a law of a "general nature" within the meaning of the Constitution. This conceded, however, why is not its operation uniform? It gives the same rule to all persons placed in the same circumstances. It does not prescribe one rule for one citizen or soldier, and another for his neighbor, if they are in the same situation. We have a statute regulating continuances on account of the absence of witnesses, which gives a uniform rule to all litigants. And yet one may be entitled to a continuance and another not. This results not because a different rule is prescribed for each, but because one brings himself within its terms, and the other does not. So *all* persons in the actual military service of the United States, or of this State, can claim the benefit of the statute, and any one can have the same benefit if in the service. Those that are not, are not entitled to the same advantage, so to speak, because in the discretion and wisdom of the legislature it was deemed inexpedient. And yet this advantage may be and is extended to all upon the same terms: See *Dalby* vs. *Wolff*, 14 Iowa 228, and cases there cited.

But does this law impair the obligation of contracts, and is it therefore in conflict with Sec. 10, Art. 1, of the Constitution of the United States?

The inquiry here presented has been most elaborately discussed by the ablest legal minds of the nation, and is yet invested with very great difficulty. This difficulty results not so much from any ambiguity in the language used, as from a seeming effort to make it mean more or less than was intended.

The language under consideration is: "No State shall pass any law *impairing* the *obligation* of contracts."

The pivotal words, as applied to the present case, are, "impairing," and "obligation;" the latter being the most important. In discussing this question we find the following among other definitions: Justice WASHINGTON in *Ogden* vs. *Saunders*, 12 Wheat. 318: "The *obligation* of a contract is the law which binds the

parties to perform their agreement." Justice THOMPSON: "It is the law which creates the obligation, and whenever, therefore, the *lex loci* provides for the dissolution of the contract in any prescribed mode, the parties are presumed to have acted subject to such contingency." Justice TRIMBLE: "It may be fairly concluded that the *obligation* of the contract consists in the power and efficacy of the *law*, which applies to and enforces performance of a contract, or the payment of an equivalent for its non-performance. The *obligation* does not inhere and subsist in the contract itself *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term *obligation*." Chief Justice MARSHALL: "*Obligation* and remedy, then, are not identical. They originate at, and are derived from different sources. It would seem to follow that the law might act upon the remedy without acting on the obligation."

In *Bronson* vs. *Kinzie*, 1 How. 311, it is said that: "Whatever belongs to the remedy may be altered according to the will of the State, *provided the alteration does not impair the obligation of the contract.* But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution." And in *Sturges* vs. *Crowninshield*, 4 Wheat. 200, it is said: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

Justice MCLEAN in his dissenting opinion in *Bronson* vs. *Kinzie*, *supra*, says: "The idea that the remedy attaches itself to the contract so as to constitute a part of it, is too abstract for practical operations; every contract is entered into with a supposed knowledge by the parties, that the law-making power may modify the remedy. And this it may do, at its discretion, so far as it acts only on the remedy."

Then in *Gantley's Lessees* vs. *Ewing*, 3 How. 707, referring to the case of *Bronson* vs. *Kinzie*, it is said to have been there held,

that the right and a remedy substantially in accordance with the right were equally parts of the contract secured by the laws of the State where it was made, and that a change of the laws, imposing conditions and restrictions on the mortgagee in the enforcement of his right, and which affected its substance, impaired the obligation, and could not prevail; as an act directly prohibited could not be done indirectly.

Says DENIO, J., in *Morse* vs. *Gould*, 11 N. Y. 286: "The most obvious method by which a contract may be impaired by legislation, would be the alteration of some of its terms or provisions, so that, assuming the validity of the law, the parties would be relieved from something which they had contracted to do, or would be obliged to do something which the contract did not originally require. * * It is admitted that a contract may be virtually impaired by a law which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor under the legal remedies existing when the contract was made, are substantially defeated. With this qualification the jurisdiction of the States over the legal proceedings of their Courts is supreme." And after citing and quoting from a number of authorities, he says they "are exemplifications of the principle that legal remedies are in the fullest sense under the rightful control of the legislatures of the several States, notwithstanding the provision in the Federal Constitution, securing the inviolability of contracts; and that it is no valid objection on that subject that the substituted remedy is less beneficial to the creditors than the one which obtained at the time the debt was contracted."

And it will be remembered that Chancellor KENT said in *Holmes* vs. *Lanning*, 3 Johns. Cas. 75, that the provision in question was not violated "so long as contracts were submitted, without legislative interference, to the *ordinary* and *regular* course of justice, and the existing remedies were preserved in substance and with integrity."

In his Commentaries, I, 455, 6, he refers to the remarks of C. J. MARSHALL in *Sturges* vs. *Crowninshield*, *supra*, and says they were general and latitudinary, "that to lessen or take away from the extent and efficiency of the remedy to enforce the contract

legally existing when the contract was made, impairs its value and obligation." And says COWEN, J., in *Butler* vs. *Palmer*, 1 Hill. 324: "Were the questions *res nova* we might feel great difficulty in distinguishing between the obligation of the contract, and a remedy given by the law to enforce it. It is difficult under the notion that obligation and remedy are essential to each other, to see how the latter can be impaired without producing the same consequence to the other." "An unfortunate distinction," says SEDGWICK, Stat. & Cons. Law 133, "has been drawn by the highest Federal tribunals, between the obligation of a contract and its remedy. It has been repeatedly regretted that the State Courts have adopted it, and it is now two late, perhaps, to hope for its abandonment. What relates to the remedy is understood to be at the mercy of legislation, but the obligation of contracts is covered by ægis of the Federal charter."

We have quoted thus fully from some of the leading cases and text books, to show the sweeping language used, that after all they do not give us a practical line of demarkation in fixing the powers of State Legislatures, and that in effect the whole subject is left open to legislative discretion, when acting upon a matter solely affecting the remedy, subject to the opinion of the Courts whether "the existing remedies were preserved in substance and with integrity," or as another case expresses it, whether the "remedy is destroyed or so embarrassed that the rights of the creditor under the legal remedies existing when the contract was made, are substantially defeated." 11 N. Y. 286. And they also show (with due deference let it be said) "trials of logical skill," and in some instances "visionary speculation" upon a subject which is addressed, as Mr. STORY says "to the common sense of the people" and the Courts, and which becomes involved in difficulty in the proportion that we attempt to indulge "in metaphysical refinements."

Regrets have been indulged, that a distinction should have been drawn by the Federal and other Courts between the obligation of a contract and the remedy given to enforce it. The writer of this opinion may be permitted to express his regret that the distinction has not been more clearly kept up, and that anything was

ever said confounding or connecting the one with the other. The argument of Justice McLEAN in his dissenting opinion in the case of *Bronson* vs. *Kinzie*, 1 How. 311, is in my opinion unanswerable, and gives a construction to the language of the Constitution which is plain and intelligible, which any mind sophisticated or unsophisticated (to use the language of Mr. Dallas) can understand. Every mind and every case to be found recognises a clear distinction between the obligation of a contract and the remedy. And to attempt to draw the dividing line, and say that the legislature may change some parts of remedial statutes and not others—or that some such changes affect the obligation, and are therefore invalid, while others do not, and are therefore valid, leads to confusion; leaves courts and the public in a wide field of uncertainty, without a reliable chart or compass; and necessarily involves the decisions of the several states in inconsistency, each Court being left to determine under the general and sweeping language of the leading cases, whether existing remedies have by the new statute been preserved in substance and with integrity. It seems to me that no one can refer to all the decisions made and reconcile them.

We can all understand that the obligation meant by the Constitution is legal and not moral—that it arises under civil laws—that it is the legally binding power of the contract, which renders the person liable to coercion or punishment for its violation. But is he to be coerced or punished under and by the law, according to the provisions of the statute existing at the time the obligation was entered into and in no other way? Or may the legislature,—not relieving him from anything promised—nor imposing more than was originally required by the contract—change the remedy, without impairing the obligation? And if this may be done, where is the line? where does legislative power cease, and when may it be exercised? It is assumed that this may be done, for laws which do nothing more than change the remedy, are not liable to constitutional objection, and although the new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, it will not follow that the

law is unconstitutional. But then, in altering the remedy, the obligation of the contract must not be so impaired that the obligation and the rights of a party under it, may in effect be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth preserving. TANEY, C. J., 1 How. 315. Then, though the new statute may furnish a remedy less convenient than the old, and render the recovery of debts more tardy and difficult—yet, if the remedy is not destroyed or so burdened with new conditions and restrictions as to make it hardly worth pursuing, it does not violate the Constitution, and will be upheld. And yet what language could leave the whole question in more doubt or uncertainty? It seems to me it would have been vastly more satisfactory to have recognised broadly, clearly and fully, a distinction between laws relating to the contract itself and those relating to the remedy, and abandoned the effort to occupy any middle ground, or if this distinction was not deemed advisable, then adopt the principle of the New Jersey Constitution: "That the legislature shall not deprive a party of any remedy for enforcing a contract which existed when the contract was made." Either rule to my mind would have been much more convenient, practical, and just, than that (if rule it can be called) adopted, and while I deem the reasoning of Justice McLEAN, above referred to, more in accordance with the Constitution, the rule which denies the right to interfere with any part of the remedy, is vastly preferable to any middle ground. It has at least the merit of practical certainty, and this to me as a judge, and I think, to the public, is worth more than all effort to arrive at abstract theoretical perfection.

But for a moment let us refer to some of the cases and see whether they bring us any nearer a certain, practical rule upon this subject. As applied to existing contracts, it has been held that appraisement laws are invalid: 2 How. 608. Also, that a law giving twelve months to redeem after a sale under a mortgage was invalid, as applied to an instrument which contained a power to the creditor to sell and make his debt: 1 Id. 311. But the Legisla-

ture may pass a recording act by which an elder grantee may be postponed to a younger, if the prior deed is not recorded within the limited term, whether the deed is dated before or after the passage of the act, thus rendering the prior deed fraudulent and void against a subsequent purchaser: *Jackson* vs. *Lamphire*, 3 Pet. 280. And so it is competent for the Legislature to abolish imprisonment for debt, upon prior as well as future debts. This is well settled: *Mason* vs. *Haile*, 12 Wheat. 373; *Gray* vs. *Monroe*, 1 McLean 528; 4 Wheat. 200. In Michigan, a statute taking away the right of a mortgagee to maintain ejectment before foreclosure, was held unconstitutional as to prior mortgages: *Mundy* vs. *Monroe*, 1 Mich. 68. But in Maine (10 Shepley 318) it is held that a remedy for a party may be changed or wholly taken away by the Legislature. In California, a law allowing a redemption of property enacted after the contract was made, was held invalid as applied to such contracts: 4 Cal. 128. And yet, in Alabama, 9 Ala. 713, a statute giving two years to redeem from sales on execution under prior mortgages, was sustained. So in Pennsylvania, an act prohibiting a sale of property, for less than two-thirds its appraised value, *except after the expiration of a year*, was held constitutional as to prior contracts (8 W. & S. 49). Acts for the limitation of suits at law, especially when a reasonable time is allowed for commencing actions on existing demands, are not regarded as infringing upon the Constitution, 8 Mass. 429, and see a very strong case upon this subject in 9 How. 527 (*State Bank* vs. *Dalton*). In New York it has been held that where the law conferred an extraordinary remedy upon particular creditors, a statute taking away such remedy, but leaving the ordinary means for the collection of the debt in full force, is not, though operating upon existing contracts, within the constitutional provision: *Stocking* vs. *Hunt*, 3 Denio 274. And a law exempting certain property from execution, has been held to apply to prior debts: *Morse* vs. *Gould*, 11 N. Y. 281. In this State it has been held that laws granting exemptions from execution, affect the remedy, and that the exemption of a homestead is as much a part of the remedy as the exemption of a horse or other article of property: *Helfenstein &*

*Gore* vs. *Case*, 3 Iowa 287. It is manifest, however, that Mr. Sedgwick in his work on Statutory and Constitutional Law, does not regard cases of the latter character as in harmony with the decisions of the Supreme Court of the United States, esteeming what is said on the subject in *Bronson* vs. *Kinzie*, as mere *obiter*, (and see *Forsyth* vs. *Mauhey*, R. M. Charlton 324): p. 658, 652. But the case of *Evans* vs. *Montgomery*, 4 W. & S. 218, goes quite as far in holding that a statute was valid which so modified the mechanics' lien law, as to give the purchaser no greater estate than was held by the person in possession, while, by the former law, it extended to the fee simple: And see *Conkey* vs. *Hart*, 4 Kern. 22. We have found no case which holds that laws giving the right to a stay of execution upon certain terms, would be invalid as applied to prior contracts, unless it be certain ones in Kentucky, which seem to be based upon the peculiar provisions of the statute: *Blair* vs. *Williams*, 4 Litt. 34; *Pool* vs. *Young*, 7 Mon. 587, and other cases there cited.

Mr. Sedgwick says that it is within the power of the legislature to regulate the remedy and modes of proceeding in relation to past as well as future proceedings, and hence, subject to the general rules heretofore discussed, it is, undoubtedly, competent to prescribe new rules of evidence and judicial procedure (p. 659); and to the same effect, see all the leading cases. The case of *Holloway* vs. *Sherman*, 12 Iowa 282, sustains the Act of April 7, 1860, regulating the foreclosure of mortgages, and which enlarged the time given to a defendant to answer under the previous law. The former law entitled the plaintiff to a judgment at the term next after service, while this extended the time for answering after service for nine months. And, upon the question here involved, see *Rosier* vs. *Hale*, 10 Id. 490; also, *Van Renssalaer* vs. *Snyder*, 13 N. Y. 299.

The length of this opinion forbids that we should examine, critically, these several cases and their bearing upon the proposition now under discussion. But with what consistency it can be maintained that a law abolishing imprisonment for debt, or one exempting, it may be, a thousand or ten thousand dollars of the

debtor's property, is valid; and that one providing that his property shall not be sold except under an appraisement, is invalid, we confess our inability to understand. If the one relates purely to the remedy the other does. If one does not, neither does the other, except upon a theory which has its foundation in "visionary speculations" or "metaphysical refinements"—speculation and refinements not warranted by the plain language of the Constitution. The *object* upon which the remedy is to attach, is substantially the same in both cases. In each case the right to the remedy is complete—the remedy itself, viz.: *action, judgment, and execution*, is alike unimpaired—but in the one case the *object* is entirely taken away, while in the other it is left, but has to be dealt with or disposed of in a manner different from that prescribed in the prior law.

But we cannot further follow the argument. It only remains to apply what has been said to the case before us, and settle the rights of these parties. The Legislature has said that a person in the military service of the United States, or this State, shall be entitled to a continuance in all actions then pending or afterwards to be brought. It certainly relates to the remedy; and the question is, does it take away all remedy upon this and similar contracts, or impose upon it such new burdens and restrictions as materially to impair its value and benefit. For if it does not, then, according even to the majority of those cases which have gone the furthest in connecting the remedy with the contract or its obligation, the act will be upheld.

In legislation of this character, very much must necessarily be left to the wisdom and discretion of the law-making power. And while our power to hold an act of the Legislature unconstitutional and void, is unhesitatingly admitted, and should always, in a proper case, be fearlessly exercised, yet it is of the most delicate and responsible nature, and should not be resorted to unless the case be clear, decisive, and unavoidable: *Santo* vs. *The State*, 2 Iowa 208, and the cases there cited. That such a case is before us we cannot believe.

The Act of 1861, Ch. 7, which this amends, granted these

continuances to those in the military service, if it appeared that their presence was in any degree necessary for a full and fair defence of the suit. And it was said in *Lucas* vs. *Casady et al.*, 12 Iowa 567, that we were disposed to give that act a liberal construction in view of its design and purpose. If such continuances could properly be provided for and granted, if it appeared that the presence of the suitor was in any degree necessary for a full and fair defence, why may not the Legislature, in the exercise of a wise discretion, determine that the presence of all persons thus situated, is necessary, and, if they ask it, they shall be entitled to a continuance of their suits?

But does this legislation do more than relate to the proceedings of Court? Suppose, in consequence of the public danger, and the great and absorbing interest felt in the national welfare, the Legislature had postponed the terms of all courts for one or two years, or even more? would any judicial tribunal have been justified in holding a term, in the mean time, and passing upon the rights of parties? If so, when, where, and by what authority? Or suppose it had been provided that in all actions upon promissory notes against these volunteers, their signature should be established by at least two competent witnesses, whereas, in ordinary cases, no proof of signature whatever was necessary, unless the same was denied under oath? Aside from a possible objection that such a law did not have a uniform operation, and was, therefore, invalid, no possible argument could have been made against it for the right to prescribe new rules of evidence, so that the validity of the proof on which the claim is founded, is not destroyed, is not denied in any of the authorities.

But this act only gives a new rule of judicial procedure, in that it extends the time for pleading. The obligation of the contract itself remains in all its integrity. The party is delayed in the enforcement of his right, but all remedy is not taken away. How far the value or benefit of the remedy may be impaired (and especially materially) by what are termed the new burdens or restrictions imposed by the act, we cannot know in this or any other particular case. Nor is this the true inquiry. At most, the

proper inquiry is whether, as a rule, this law as applied to all cases coming within its terms, so far affects the value and benefit of the remedy to which parties were previously entitled as to impair the obligation of their contracts. And satisfied that the Legislature has not so far exceeded its power in this respect as to justify our interference, we shall sustain the law and affirm the judgment of the Court below.

1. The great practical importance of the questions so ably discussed in the foregoing opinion have induced us, notwithstanding its length, to publish it entire. We are indebted for it to the courtesy of Mr. Withrow, the Iowa State Reporter. It may not be improper to remark that Mr. Justice WRIGHT, by whom it was delivered, is deservedly esteemed as one of the most acute and enlightened jurists in the Northwest.

No lawyer who has had occasion critically to examine the numerous judgments and multiplied discussions in the Federal and State Courts upon the prohibitory clause against impairing the obligation of contracts, but will agree that many of the decisions are wholly irreconcilable.

One class of cases asserts the broad proposition that the obligation of a contract, legally considered, consists in the remedy which the law gives to enforce it, and as a necessary consequence the remedy cannot be impaired without, at the same time and to the same extent, impairing the obligation. As examples see Blair *vs.* Williams, 4 Litt. (Ky.) 34; Id. 47; McKinney *vs.* Carroll, 5 Mon. 98.

This view is not the general one, and would have the practical effect of impairing the right of the Legislature to make salutary and necessary changes in legislation and in the public policy of the State.

The opposite extreme is found in another class of cases which as broadly maintain that the "remedy for a party may be changed, or wholly taken away by the Legislature without contravening the Constitution of the United States." As examples see Read *vs.* Frankford Bank, 10 Shepl. 318; 6 Id. 109; Woods *vs.* Buie, 5 How. (Miss.) 285; Evans *vs.* Montgomery, 4 W. & S. (Penna.) 218; Iverson *vs.* Shorter, 9 Ala. 713; Catlin *vs.* Munger, 1 Texas 598; Fisher *vs.* Lackey, 6 Blackf. 373.

The "middle ground" (the soundness of which is, *arguendo*, called in question, rather than denied in the case under consideration) is that the remedy may be modified but not destroyed; changed, but not in such a manner as so to embarrass and clog the creditor, as substantially to impair or defeat his rights. This view, whatever may be said against it (and it is certainly open to the objections which Mr. Justice WRIGHT urges), is clearly supported by the present weight of authority, both Federal and State. See Sturges *vs.* Crowninshield, 4 Wheat. 200; Mason *vs.* Haile, 12 Id. 373; Morse *vs.* Goold, 1 Kern. 281 (opinion by DENIO, J.); Conkey *vs.* Hart, 4 Id. 22; Chadwick *vs.* Moore, 8 Watts and Serg. 49. In the last case Chief Justice GIBSON, with the brevity and force which characterize everything that came from that great judge, showed that this was the only ground under such a system of government as ours, at all consistent with progress and im-

provement in legislation. In Indiana (Hunt *vs.* Gregg, 8 Blackf. 101), Iowa, (Schaffer *vs.* Bolander, 4 G. Greene, 201; Id. 393; Rosier *vs.* Haile, A. D. 1860, 10 Iowa 470), and in the Western States generally, Bronson *vs.* Kinzie has been followed, though its correctness has sometimes been doubted. We do not understand the case under review to be placed upon the ground that no possible interference with the remedy would infringe the Constitutional provision, but the suggestion is made and enforced that this would be the sounder, plainer and better rule, if the question is to be considered as remaining open.

And we must be permitted to observe, in view of the uncertainty and doubt in which the cases are involved, that there is great force in the suggestion. It seems almost impossible to use plainer language than that in which the constitutional inhibition is expressed. And when we turn from this and behold the deep obscurity with which it has been darkened by the refinements and speculation of Judges, we are tempted to exclaim: *Great is the mystery of judicial interpretation!* But it is not our intention to enter upon the general subject, having already given it all our available space. We dismiss it with the remark that a vigorous, logical, legal thinker could render the profession no better service than to clear away the confusion which has, quite unnecessarily, as we think, been suffered to gather around the plain provision of the Constitution.

II. The above decision has also a practical value in view of the fact that other States besides Iowa have passed laws of a similar character.

Whether the decision is correct depends of course upon the true meaning of the Constitution. If the Courts have full power over the remedy, the validity of the act is clear. But if "the middle ground" is the correct one, while the constitutionality of the statute is more doubtful and question more delicate, still it seems to us not difficult to sustain the law. The military exigencies of the country are imperative. The Legislature must be permitted to exercise some discretion, to have some regard to the general condition of the country. The act does not deprive the creditor of his right to sue. The provisional remedies by attachment, &c., remain in force. The time of pleading and trial are postponed only, and for but a limited time. The period of enlistment does not exceed three years. The law applies to those only who are in the actual military service, and only while they remain in it. If the defendant had been *drafted* it would indeed be hard to require him to prepare for and go to trial in his absence, the more especially in Iowa as parties are entitled to be examined as witnesses in their own behalf and at their own instance, and without regard to the presence or absence of their adversary. And in determining the legal question, it can make no difference whether the defendant voluntarily enlisted or was conscripted. Woods *vs.* Buie, 5 How. (Miss.) 285; Holloway *vs.* Sherman, 12 Iowa 283, in principle very strongly support the above decision.

In Pennsylvania a very similar law to that of Iowa has recently been declared constitutional. By an act of 1822 officers and privates of the organized militia were exempted from execution and other civil process while called into actual service under a requisition of the President, or orders of the Governor.

In 1861, a supplementary act was passed in the following words: "No civil process shall issue or be enforced against any person mustered into the

service of this State or of the United States, during the term for which he shall be engaged in such service," &c., and suspending the running of the Statutes of Limitation in such cases. The Supreme Court of that State, in Breitenbach *vs.* Bush (8 Wright, not yet published,) affirmed the constitutionality of the latter act, Justice WOODWARD, in delivering the opinion of the Court, taking the ground that the exemption was an interference with the remedy only, which could not extend beyond three years, that being the term of enlistment of the appellant in the case, and saying that the Court "cannot pronounce it unreasonable."

In Coxe *vs.* Martin, (8 Wright, not yet published,) the same Court decided that a scire facias upon a mortgage was within the prohibition of the act.

Where, however, the parties to a contract expressly include in it the legal remedy by which it is to be enforced, the Legislature cannot pass any law to change the remedial process agreed upon. The defendant having expressly waived *all* stay of execution, an act giving a stay in all such cases was held unconstitutional as to such contract. Billmeyer *vs.* Evans, 4 Wright (Penna.) 324.

J. F. D.

## *Supreme Court of Pennsylvania.*

SMITH ET AL. *vs.* LATHROP ET AL.

Except in matters ruled by the clause of the Federal Constitution declaring that "full faith and credit" shall be given in each State to judicial proceedings in every other State, the Courts of the several States are foreign Courts as to each other.

Therefore the plea of *lis pendens* in another State is no defence to a suit at the same time and for the same cause of action in Pennsylvania.

Opinion of the Court by

READ, J.—The question in this case arises upon an affidavit of defence, alleging the pendency of a prior action by the same plaintiff against the same defendants for the same cause of action in the city of New York, in the State of New York, and which is still undetermined. It is proper that such a question should be definitively settled.

In England it may be pleaded that there is another action depending for the same trespass, or other cause of action in the same or any other Superior Court at Westminster. But it was decided by the Privy Council in 1792, in *Bayley* vs. *Edwards*, 3 Swanston